No. 626. Oct. Term 54

Br. of Respt. Herein for Cross Pet.

FILED
MAY 28 1900
JAMES H. McKENNEY,
Clerk.

10947

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed May 28, 1900.

No. 626.

HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED,
Petitioner,

vs.

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
Respondent.

Petition for Certiorari on Behalf of Respondent.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of the Rahtjen's American Composition Company, the respondent in the cause above entitled, respectfully shows to this Honorable Court:

I. That the above-named petitioner in this cause has heretofore filed its petition in this Court for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit, to review the decree and decision of that Court in this case, awarding to the respondent herein an injunction and costs against said

petitioner; and this Court has granted said petition and ordered that such writ issue. With its petition the said petitioner filed a complete record of the cause in the Court below, with the opinions of the said Court and of the United States Circuit Court therein, to all of which the respondent craves leave to refer upon the present petition.

II. As by reference to the record so filed appears, the United States Circuit Court of Appeals found that this respondent had and has a valid trade-mark for the article as placed upon the markets of this country, which had been infringed and used without authority by the petitioner herein; whereupon said Court made its decree for an injunction and costs as aforesaid, but did not order an accounting for damages or profits by reason of such use and infringement of respondent's trade-mark by said petitioner. Respondent by its bill of complaint prayed for such accounting, which it avers was erroneously refused by said United States Circuit Court of Appeals, and to preserve its rights in the premises now prays this Court that a writ of *certiorari* to said United States Circuit Court of Appeals in this cause may be granted to the respondent, requiring said Court to certify and transmit to this Court a full and complete transcript of the record and all proceedings of said Court in this cause, to the end that the same may be here reviewed and determined as provided by law and the accounting so prayed for be ordered and decreed.

And your petitioner, the above-named respondent, will ever pray, etc.

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
By OTTO L. PETERSEN,
President.
THOMAS B. KERR,
TIMOTHY D. MERWIN,
Respondent's Counsel.

STATE OF NEW YORK, }
County of New York, } ss.:

OTTO L. PETERSEN, being duly sworn, says that he is an officer—to wit, the president—of Eahtjen's American Composition Company, the respondent above named; that he has read the foregoing petition and knows the contents thereof, and that the facts therein stated are true to the best of his information and belief.

OTTO L. PETERSEN.

Subscribed and sworn to before me this 26th day of May, 1900.

ATKINS B. CUNNINGHAM,
[NOTARIAL SEAL.] Notary Public,
N. Y. Co.

I certify that in my opinion the above petition is well grounded in matter of law and proper to be heard.

TIMOTHY D. MERWIN,
Of Counsel for Petitioner.

Memorandum in Support of Petition.

Since by the provisions of the statute under which the petition for the writ of *certiorari* heretofore granted herein to the Holzapfel's Compositions Company, Limited, as petitioner (viz., an Act to establish Circuit Courts of Appeal, etc., approved March 3, 1891, Sec. 6), this cause must be considered by this Court in the same manner as if it came up upon writ of error or on appeal, the foregoing petition is presented in order that all questions involved in said cause may be properly before this Court for its consideration. Inasmuch as the entire record has been certified up from the Circuit Court of Appeals, all matters of record in said Circuit Court of Appeals pertaining to the subject matter of this petition will be before this Court. Upon the argument of the cause as now ordered certified to this Court, the right of the respondent to the relief hereinabove prayed for will necessarily be determined, since it is based, and wholly dependent, upon the merits of the cause. It is apparent, therefore, that no additional burden will be placed upon this Court by the granting of the above petition, and the consideration of the question of the respondent's right to an accounting as prayed for.

Dated New York City, May 23, 1900.

Respectfully submitted,

THOMAS B. KERR,

TIMOTHY D. MERWIN,

Counsel for Respondent.